IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12354 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BHAVNAGAR MUNICIPAL CORP.

Versus

RAJESHBHAI DEVJIBHAI KAMBAD

Appearance:

1. Special Civil Application No. 12354 of 2003

MR RM CHHAYA for Petitioner No. 1

MR ASHISH D OZA for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE A.R.DAVE

Date of decision: 19/03/2004

ORAL JUDGEMENT

Rule. Service of rule is waived by learned advocate Shri Ashish Oza for the respondent. At the

request of the learned advocates, the petition is finally heard today.

2. The petitioner-Corporation has been aggrieved by an order dated 9.5.2003 passed in Civil Misc. Appeal No. 9/03 by the Jt. District Judge, Bhavnagar. By virtue of the said order, the appellate court has confirmed an order dated 29.1.2003 passed by the 2nd Jt. Civil Judge, (S.D.) Bhavnagar, in an application below Ex. 5 in Regular Civil Suit No. 736/02.

3. The facts giving rise to the present petition, in a nutshell, are as under :

3.1 The respondent filed Regular Civil Suit No. 736/02 in the Court of the 2nd Jt. Civil Judge, (S.D.) Bhavnagar. In the said suit, an application below Ex. 5 was filed, wherein it was prayed that the Bhavnagar Municipal Corporation - the defendant in the said suit (the petitioner herein), be prevented from removing a cabin belonging to the present respondent in Panwadi area of Bhavnagar. The said application below Ex. 5 had been granted and, therefore, the present petitioner had filed Civil Misc. Appeal No. 9/03 in the Court of the Jt. District Judge, Bhavnagar. The said appeal has been dismissed by an order dated 9.5.2003 and, therefore, the petitioner has approached this court by way of this petition.

4. Learned advocate Shri Rashmin Chhaya appearing for the petitioner-Corporation has submitted that the courts below materially erred in law as well as on facts by not considering the contents of Mark 10/3, whereby the respondent-plaintiff was given permission to have his lorry in the limits of Bhavnagar Municipal Corporation.

5. Learned advocate Shri Chhaya has drawn my attention to Mark 10/3, which is a copy of Resolution No. 2287 passed by the Standing Committee of the petitioner-Corporation. It has been submitted by him that the courts below did not appreciate the fact that the petitioner-Corporation had permitted the predecessor-in-title of the respondent to ply his lorry within the limits of Bhavnagar Municipal Corporation. It has been submitted by him that, as the predecessor-in-title of the present respondent Shri Dhanjibhai Narsibhai was given a right to ply his lorry, the present respondent can not have any right to have a cabin, a right which his predecessor-in-title did not have. It has been, therefore, submitted by him that the courts below had materially erred in coming to a prima

facie conclusion that the plaintiff was permitted to have a cabin for doing his business in the name and style of "Komal Pan centre" in Panwadi area of Bhavnagar.

6. On the other hand, learned advocate Shri Ashish Oza appearing for the respondent has submitted that the respondent has a right to have his cabin. He has tried to support the orders passed by the courts below. He has also submitted that a sum of Rs. 15,000/- had been paid by the respondent to the petitioner-Corporation when the respondent was transferred the right in respect of a cabin, which originally belonged to Shri Dhanjibhai Narsibhai. It has been submitted by him that had Shri Dhanji Narsi got no right to have a cabin, the petitioner Corporation would not have taken Rs. 15,000/- by way of transfer fees. He has, therefore, submitted that the cabin put up by the respondent should not be removed by the petitioner-Corporation.

7. I have heard the learned advocates and have perused the relevant record. Looking to the contents of Resolution No. 2287 dated 27.7.1970 passed by the Standing Committee of the petitioner-Corporation, it is very clear that, though Shri Dhanji Narsi had made a request to the petitioner-Corporation to permit him to put up his cabin near Panwadi Chowk, Shri Dhanji Narsi was permitted to ply his lorry and not put up a cabin.

8. It is not in dispute that the respondent got his right from Shri Dhanji Narsi. If Shri Dhanji Narsi was not having any right to have a cabin, he could not have given any right to have a cabin at Panwadi to the respondent.

9. It is unfortunate that the courts below did not appreciate the contents of Mark 10/3, which was very much on record.

10. From the facts stated hereinabove, and looking to the contents of the resolution referred to hereinabove, the respondent is not having any right to have a cabin at Panwadi. He was only given a right by the petitioner to ply a lorry within the limits of Bhavnagar Municipal Corporation.

11. So far as the averment made by learned advocate Shri Oza with regard to payment of Rs. 15,000/- by way of transfer fee is concerned, learned advocate Shri Chhaya appearing for the petitioner has submitted that, as Shri Dhanji Narsi was not having a right to have a cabin, there was no need of paying Rs.15,000/- to the

petitioner-Corporation by the respondent. It has been submitted by him that possibly because of some mistake or mischief committed by someone, the said amount was deposited with the Corporation and appropriate action has also been taken against the concerned person for the mistake committed.

12. So far as the payment of Rs. 15,000/- is concerned, it is clear that the said amount should not have been paid to the petitioner Corporation by the respondent as there was no 'cabin account' of Shri Dhanji Narsi with the petitioner-Corporation. It would be open to the respondent to give an application for return of Rs. 15,000/-, which has been paid because of a mistake, and I am sure that upon getting such an application, the petitioner-Corporation shall return the said amount to the respondent as soon as possible.

12. For the reasons recorded hereinabove, the impugned orders passed by the courts below are not just and proper. The courts below should not have permitted the respondent to have his cabin especially when Shri Dhanji Narsi, from whom the so-called right had been transferred to the present respondent, was not having a right to have a cabin.

13. Needless to say that Shri Dhanji Narsi had a right to have his lorry within the limits of Bhavnagar Municipal Corporation and, therefore, the respondent will have a right to have his lorry plied within the limits of Bhavnagar Municipal Corporation. It would be open to the respondent to do his business as a hawker and keep his lorry at the places, which have been earmarked as hawking zone, in accordance with the policy of the petitioner Corporation.

14. In the circumstances, the order dated 9.5.2003 passed in Civil Misc. Appeal No. 9/03 confirming the order dated 29.1.203 passed in the application below Ex. 5 in Regular Civil Suit No. 736/02, is quashed and set aside.

The petition stands disposed of as allowed. Rule is made absolute with no order as to costs.

(A.R. Dave, J.)

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